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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JAN 05 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a design engineer. The petitioner's current employer is [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits his own statement and a witness letter.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director,

however, did not raise this issue. The AAO will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on February 3, 2010. In an accompanying statement, the petitioner stated: "I am one of the small percentage of researchers who has risen to the top of their field i.e. semiconductor design[.] More specifically, I am Expert in accelerating and enhancing digital design." Switching to the third person, he stated:

> [The petitioner's] primary area of work is to test, characterize, and debug semiconductor design from system level down to individual block and identify low level design that is at fault. This also involves validation and testing of the design and development of the circuitry of the end product by using computer architecture design knowledge. [The petitioner] has a keen interest in the field of "Design for Testability." This is a very precise technique to find the circuitry that is at fault. Today's semiconductor chip design consists of billions of transistors, and to find a failed circuit is not trivial but requires the utmost skill and experience. . . . [The petitioner] has also been working as a research scientist in the computer science department at [redacted] His research project is to accelerate a biosequence search that is being deployed to biologists. The successful answering of his research question would be applicable well beyond biosequence search problems and computational science.

A December 23, 2008 job offer letter from [redacted] indicated that the petitioner's "position will run through August of 2010, with the possibility of the term being extended contingent on available funds." The beneficiary's H-1B nonimmigrant status permits him to work for [redacted] until January 20, 2012, well past the project's tentative end date. Because the petitioner already holds nonimmigrant status permitting him to work for [redacted] past the projected ending date of the inherently temporary project, the petitioner did not require permanent immigration benefits to complete that project. Therefore, any claimed need for the petitioner's continued involvement in the project is not, by itself, a strong basis for the waiver claim. Denial of the waiver would not remove him from the inherently temporary project.

Four witness letters accompanied the petitioner's initial filing. [redacted] manager of the [redacted] stated:

> [The petitioner] worked for [redacted]. . . . as a technical support engineer in the chipset division from March 2007 to January 2009.
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> . . . He was involved in post silicon debugging of chipset product, in which his role was to detect any defects in the semiconductor design and manufacturing units. Semiconductor hardware design is a difficult job, but debugging a defect in it is even more challenging and a surmountable task. It requires special training, judgment, education and skill, to be able to deliver a sophisticated product for mass production in a global market. . . .

> I can testify that [the petitioner] is unequivocally capable to work in professional capacity and has shown his dedication in work which has involved in activates [*sic*] such as wide range of data collecting and analysis. I have found [the petitioner] profoundly dynamic, sincere and exemplary in his dedication. . . . [The petitioner] has taken the opportunity to chair meetings with application engineers of different groups, and during the process, he has shown his capability to accomplish these critical tasks successfully.

[redacted], senior technical support engineer and the petitioner's former supervisor at [redacted] chipset division, stated:

> [The petitioner] was involved in several research and experimental project[s] to improve power efficiency of the latest chipset products. His responsibility was to develop different techniques for stress tests and to observe performance, behavior and failure points. He also maintained results and supported the application engineering teams of [redacted] worldwide. He was extensively involved in debugging faulty nano scale on-chip, on-board designs. His task was to duplicate issues on different in-house reference boards, and resolve nano scale semiconductor technology based issues. His research and experimental data were included in technical documents of [redacted] chipsets that were published worldwide to [redacted] customers.
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> . . . He has incredible abilities of gathering experimental data and collecting information that helped improve our capability to support customers worldwide. . . . It would be very difficult, if not impossible, to replace the level of training, skills, and dedication he has brought to our projects, and in essence brought to the Unite[d] States in efforts to develop advanced techniques in areas of semiconductor technology and material science in general.

[redacted], vice president of [redacted], stated:

> [The petitioner's] responsibilities on this project have ranged from diagnostic investigations (helping to debug problems in the original system) to design of new elements (aimed at further performance gains). . . . An important aspect of his contribution is helping in the research task of assessing whether or not properties of the biosequence database can be exploited to dynamically alter the architecture of the computation engine. The successful answering of this research question would be applicable will beyond just biosequence research problems, with utility across the whole range of computational science.

[redacted] stated:

> I am principal investigator of [redacted] and leader/PI of the NIH-funded [redacted] which is a joint effort between [redacted] This project seeks to construct hardware accelerators for computationally challenging problems in biological sequence analysis. In particular, we are developing an accelerated version of the widely used [redacted]
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> [The petitioner] has been a staff member on the [redacted] project since January of 2009. He is formally a [redacted] employee, though with an office at [redacted] . . . His duties include debugging, enhancement, and documentation of the [redacted] hardware, which is based on a field-programmable gate array (FPGA) architecture, as well as conducting computational experiments to study the performance of both [redacted] software application. He will also provide front-line end user support for [redacted] as we roll out the system to users at the [redacted] in the coming months.
>
> . . . [The petitioner] is now a valuable member of the group. I have been very satisfied with his ability to track down difficult design bugs in the [redacted] implementation and to conduct comprehensive benchmarking of [redacted] in order to evaluate the relative sensitivity and speed of our hardware and the standard software. . . . Overall, [the petitioner] is an asset to our group and generally to the progress of computational biology in the United States, and his technical skills and contributions would be difficult to replace.

The above letters appear to portray the petitioner's work as providing technical support and quality control to other workers who actually perform research and product development. Also, the letters appear to indicate that the [redacted] project is an internal university project rather than one intended for wider distribution.

On April 2, 2010, the director issued a request for evidence, instructing the petitioner to establish that his intended work will be national in scope. The director also asked for evidence of the petitioner's past impact and influence on his field. In response, in a letter dated May 11, 2010, [redacted] stated that the [redacted] "project as a whole has been quite successful," and that the petitioner "has made a number of significant contributions." [redacted] asserted that the petitioner's "diagnostic work was the catalyst for [two] soon to be published papers. . . . Even though he was not a co-author on the publications, his achievement included the initial diagnostics. In short, his work was what led the authors down the correct research path." [redacted] added that the petitioner contributed to a technical report published in May 2010, several months after the petition's filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes

eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Even then, the petitioner did not establish the importance of the new technical report.

The petitioner submitted evidence that he received two "Students Providing Exemplary Customer Service Awards" from the [redacted] The record contains no further information about these awards. Therefore, there is no evidence that the awards for customer service at a university's student union have any relevance to his occupation.

The director denied the petition on July 26, 2010, stating that the petitioner had failed to show that his intended work is national in scope. The director also concluded that the petitioner did not show "why labor certification would be inappropriate in this case."

On appeal, the petitioner discussed the overall importance of the [redacted] project. The director, however, had not contested or disputed the value of the project as a whole. Rather, the petitioner's role in that project is at issue, and the petitioner, on appeal, offers little new information in that area except to state: "we consider ways to realize existing algorithms and alternative methods with improved efficiency or better suitability for acceleration. We also investigate how do we *deploy* and *maintain* accelerated implementations for a biological community whose needs are diverse and rapidly changing." At best, the petitioner appears to be involved in fine-tuning a system already created by others.

The petitioner notes that [redacted] had previously filed a Form I-140 petition to classify him as a member of the professions holding an advanced degree. That petition, with receipt number [redacted] included an approved labor certification. The director approved that petition on September 24, 2008, but rather than remain at [redacted] and adjust to permanent resident status through the approved petition, the petitioner left [redacted] just a few months later to work in Missouri. (The petition remains approved; the petitioner has not yet filed Form I-485 to adjust status.) The petitioner does not explain why he left [redacted], but the approval of the prior petition does not imply eligibility for the national interest waiver. It merely demonstrates that his employer was successful in obtaining an approved labor certification for him. The petitioner stated that he filed the present petition "in order to preserve [his] previous priority date." This explanation establishes the petitioner's own interest in the process, but does not demonstrate national interest.

The petitioner submitted a new August 25, 2010 letter from [redacted] The letter is almost identical to his earlier May 11, 2010 letter, except for an added paragraph in which [redacted] attempted to establish the national scope of the petitioner's work:

> The Novo-G Forum is a group of researchers that are investigating the use of acceleration technology on a host of computationally important problems. The forum is lead [*sic*] by the NSF Center for High Performance Reconfigurable Computing at the Univ. of Florida and contains members [from eight] US institutions. . . . As part of

> the forum activities, we are porting the [redacted] application to the Novo-G machine, which will provide lessons that impact the work at all of these institutions.

The above assertion addresses the potential national scope of the [redacted] program, but does not imply that every worker providing technical support on that project performs work that is national in scope. [redacted] did not explain how the petitioner's contributions to the project are, themselves, national in scope. [redacted] had previously observed that the petitioner co-authored a technical report that is now available over the Internet, but the petitioner did not show that this report amounted to a dissemination of findings that others could replicate, rather than simply a description of a system in place at one institution. Despite the director's inaccurate description of the report as a journal article, the piece did not appear in any scholarly journal. It is, rather, a technical report that appears to have been prepared primarily for internal purposes, apparently without peer review, and made available on the university's own web site for ease of access.

The petitioner showed that his past and present employers consider him to be a skilled worker who makes valuable contributions to the tasks at hand. He did not, however, establish that those contributions have influenced his field as a whole or that it would otherwise serve the national interest to waive the job offer/labor certification requirement that normally attaches to the immigrant classification that he has chosen to seek.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.